Petition

Office - Supreme Court, U.S.
FILED
FEB 8 1982
ALEXANDER L. STEVAS,
CLERK

81-1460

No. 81-____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

MIGUEL TEJEDA-MATA,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CHARLES H. BARR
1207 Geo. Washington Way
Richland, WA 99352
(509) 943-4661

VILMA S. MARTINEZ
JOHN E. HUERTA
MORRIS J. BALLER*
Mexican American Legal Defense
and Educational Fund
28 Geary St., 6th Floor
San Francisco, CA 94108
(415) 981-5800

Attorneys for Petitioners
**Counsel of Record*

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTION PRESENTED

Was the violation of Petitioner's due process rights harmless error, where the violation consisted of refusal by the Immigration Judge to allow an official interpreter who was already present at Petitioner's deportation hearing to translate the testimony and evidence against Petitioner, who did not understand English?

PARTIES

All of the parties to this proceeding, both here and in the Court of Appeals, are named in the caption.

TABLE OF CONTENTS

	Page
Table of Authorities	ii
Petition for Writ of Certiorari	1
Opinions and Orders Below	2
Constitutional Provisions, Statutes, and Regulations Involved	3
Statement of the Case	5
A. Proceedings	5
B. Facts	8
Reasons for Granting the Writ	12
I. This Petition Presents an Important Unresolved Question Affecting Thousands of Deportation Proceedings.	12
II. The Decision of the Court of Appeals In Applying the "Harmless Error" Rule Conflicts With Controlling Decisions of This Court and With Principles Adopted In Other Circuits.	14
Conclusion	23
Appendix A - Opinions and Orders of the United States Court of Appeals For the Ninth Circuit	1a-40a
Appendix B - Decisions and Orders of the United States Immigration and Naturalization Service	1b-15b

TABLE OF AUTHORITIES

CASES	PAGE
Bittaker v. Enomoto, 587 F.2d 400 (9th Cir. 1978), cert. denied 441 U.S. 913 (1979)	15n, 19n
Bridges v. Wixon, 326 U.S. 135 (1945)	13, 20
Castaneda-Delgado v. Immigration and Naturalization Service, 525 F.2d 1295 (7th Cir. 1975)	16n, 20n
Chapman v. California, 386 U.S. 18 (1967)	14, 15, 16 17, 22
Fahy v. Connecticut, 375 U.S. 85 (1963)	15, 22
Faretta v. California, 422 U.S. 806 (1975)	15n, 19n
Garcia-Jaramillo v. Immigration and Naturalization Service, 604 F.2d 1236 (9th Cir. 1979)	16n
Glasser v. United States, 315 U.S. 60 (1942)	15n
Ka Fung Chan v. Immigration and Naturalization Service, 634 F.2d 248 (5th Cir. 1981)	16n
Kerner v. Celebreeze, 340 F.2d 736 (2nd Cir. 1965), cert. denied 382 U.S. 861 (1965)	17n
Niarchos v. Immigration and Naturalization Service, 393 F.2d 509 (7th Cir. 1968)	20
Nicholas v. Immigration and Naturalization Service, 590 F.2d 802 (9th Cir. 1979)	16n
Shaughnessy v. United States ex rel Mezei, 345 U.S. 206 (1953)	13

TRW, Inc. v. Federal Trade Commission, 647 F.2d 942 (9th Cir. 1981) 17

United States v. Caceres, 440 F.2d 741 (1979) 21

United States v. Carrion, 488 F.2d 12 (1st Cir. 1973) 19

United States v. Morrison, ___U.S.___, 66 L.Ed. 2d 564 (1981) 15n

United States ex rel Bilokumsky v. Tod, 263 U.S. 149 (1923) 21

United States ex rel Negron v. State of New York, 434 F.2d 386 (2nd Cir. 1970) 19

CONSTITUTION, STATUTES, RULES AND REGULATIONS

United States Constitution, Fifth Amendment 3

8 U.S.C. § 1105a 5

8 U.S.C. § 1252(b) 3, 4, 18

28 U.S.C. § 1254 (1) 3

28 U.S.C. § 2111 10, 10n

8 C.F.R. § 242.12 4, 12, 21

8 C.F.R. § 242.14 4

8 C.F.R. § 242.16 5, 18

8 C.F.R. § 242.16(a) 21

United States Court of Appeals for the Ninth Circuit, Rule 25 6n

OTHER AUTHORITIES

United States Department of Justice, Immigration and Naturalization Service, INS 1979 Annual Report (1979) 12n, 13n

No. 81-____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

MIGUEL TEJEDA-MATA,

Petitioner,

vs.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

Petitioner, Miguel Tejeda-Mata, prays that the Court issue its Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, upholding the order of deportation against him.

OPINIONS AND ORDERS BELOW

The decision of the Immigration Judge delivered February 7, 1978 is unreported and appears in Appendix B to this Petition at 1b-3b. The decision and order of the Board of Immigration Appeals, rendered November 16,

1978, is unreported and appears in Appendix B at 9b-15b. The initial decision of a panel of the United States Court of Appeals for the Ninth Circuit, entered August 29, 1980, is reported at 626 F.2d 721 and appears in Appendix A at 1a-28a. The Order of the Ninth Circuit withdrawing the panel decision and ordering rehearing before a limited en banc panel, entered February 18,1981; the Order submitting the case to the limited en banc panel without oral argument, entered March 18, 1981; and the Order requesting supplemental briefs and setting the case for oral argument, entered April 20, 1981, are all unreported and appear in Appendix A at 29a, 30a, and 31a, respectively. The Order of the limited en banc panel, returning the case to the original three-judge panel, entered September 22, 1981, is unreported and appears at 32a-37a. The Order of the three-judge panel reinstated its prior opinions and denying rehearing, entered December 11, ±981, is unreported and appears at 38a. The Order of January 4, 1981, recalling and staying the mandate, is unreported and appears at 39a. The Order of January 11, 1982, withdrawing the Order of January 4 and denying a stay of the mandate, is unreported and appears at 40a.

JURISDICTION

The judgment of the Court of Appeals was entered August 29, 1980. Petitioner's petition for rehearing was granted on February 18, 1981. Following rehearing before a limited en banc panel, the court remanded the case to the original panel, which denied the petition for rehearing on December 11, 1981. This Petition is filed within 90 days thereafter. The Court has jurisdiction under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The Due Process Clause of the Fifth Amendment to the United States Constitution provides: "No person shall...be deprived of life, liberty, or property without due process of law."

The Immigration and Nationality Act, 8 U.S.C. § 1252, provides:

> (b) A special inquiry officer shall conduct proceedings under this section to determine the deportability of any alien, and shall administer oaths, present and receive evidence, interrogate, examine, and cross-examine the alien or witnesses, and, as authorized by the Attorney General, shall make determinations, including orders of deportation. Determination of deportability in any case shall be made only upon a record made in a proceeding before a special inquiry officer, at which the alien shall have reasonable opportunity to be present....

Proceedings before the special inquiry officer acting under the provisions of this section shall be in accordance with such regulations, not inconsistent with this chapter, as the Attorney General shall prescribe. Such regulations shall include requirements that -

(1) the alien shall be given notice, reasonable under all the circumstances, of the nature of the charges against him....

(3) the alien shall have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government;

(4) no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.

Section 242 of Title 8 of the Code of Federal Regulations, containing regulations issued by the Attorney General governing deportation proceedings, provides:

§ 242.12 Interpreter.

Any person acting as interpreter in a hearing under this part shall be sworn to interpret and translate accurately, unless the interpreter is an employee of the Service, in which event no such oath shall be required.

§ 242.14 Evidence.

(a) Sufficiency. A determination of deportability shall not be valid unless it is found by clear, unequivocal and convincing evidence that the facts

alleged as grounds for deportation are true.

§ 242.16 Hearing.
(a) Opening. The Immigration Judge shall...advise the respondent that he will have a reasonable opportunity to examine and object to evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government.

STATEMENT OF THE CASE

A. Proceedings.

Petitioner was apprehended by an investigatory agent of Respondent Immigration and Naturalization Service (INS) on February 19, 1977, and given an order to show cause why he should not be deported. Petitioner denied that he was a deportable alien. A deportation hearing before an Immigration Judge took place on February 7, 1978. At the conclusion of the hearing, the Immigration Judge found Petitioner deportable (6b). Petitioner appealed to the INS Board of Immigration Appeals raising, inter alia, the Judge's refusal to require or permit translation of the English-language testimony against Petitioner into Spanish. On November 16, 1978, the Board dismissed Petitioner's appeal, finding no error in the Immigration Judge's decision (14b-15b).

On December 13, 1978, Petitioner filed his Petition for Review in the Court of Appeals for the Ninth Circuit, which had jurisdiction under 8 U.S.C. § 1105a. A panel of that Court affirmed the Board's order on August 29, 1980, one Judge dissenting (1a, 16a). The panel majority characterized the Immigration Judge's refusal to allow translation of the English-language testimony as "plainly improper" and an "abuse of discretion" (15a), in light of "the importance of an interpreter to the fundamental fairness of such a [deportation] hearing if the alien cannot speak English fluently" (14a). Nevertheless, the majority ruled that the error was harmless (15a). Judge Ferguson, in dissent, argued both that such a fundamental deprivation of due process was harmful per se (26a), and that the error was shown not to be harmless by this record (28a).

Petitioner sought rehearing. On February 18, 1981, the Court of Appeals vacated the panel's decision and granted rehearing before a limited en banc panel (29a).[1] On March 18, 1981, the Court ordered the case submitted without argument (30a), but on April 20, 1981, the Court requested

---

[1] See Ninth Circuit Rule 25.

supplemental briefs on the translation and harmless error issues, and ordered oral argument (31a). The case was argued and submitted to a panel of eleven Circuit Judges on June 12, 1981. On September 22, 1981, the en banc panel entered an Order finding the en banc assignment improvidently granted and returning the case to the original three-judge panel (32a). Judge Wallace filed a dissenting opinion, in which Judge Choy joined, stating that a majority of the entire Ninth Circuit had granted rehearing because of the importance of the questions presented, and that the decision to return the case to the original panel was made only after the en banc panel had voted on the merits and assigned the majority opinion. Judge Wallace felt this process a highly inappropriate way to resolve such an important issue (33a-37a). On December 11, 1981, the three-judge panel reinstated its earlier opinions, denied rehearing, and ordered that the mandate issue forthwith (38a). On January 4, 1982, one Judge of the original panel recalled and stayed the mandate pending the filing of this petition within thirty days (39a), but on January 11, 1982, the panel withdrew that order and denied the motion for a stay (40a).

On January 19, 1982, Petitioner applied for a stay of the Court of Appeals' mandate to Mr. Justice Rehnquist, who denied the application on Janaury 22, 1982. The application was then submitted to Mr. Justice Blackmun, who on January 26, 1982 granted a temporary stay pending filing of this petition by February 3, 1982.

2. Facts.

Petitioner speaks and understands the Spanish language, but neither speaks nor understands English (R.30).[2] He was found deportable after a deportation hearing at which all the testimony and documentary evidence (other than his own testimony) was in English and was not translated into Spanish. The Immigration Judge denied Petitioner's request for translation, although an official interpreter was present (R. 47-48).

Officer Jimmy Spence of Respondent INS's Spokane office arrested Petitioner on

---

[2]Cites in the form "R.____" are to the Certified Administrative Record, No. A21 604 306, filed in the Ninth Circuit. This record contains, notably, a transcript of testimony and exhibits introduced at Petitioner's deportation hearing.

February 19, 1977 at Connell, Washington, and issued an Order to Show Cause why Petitioner should not be deported from the United States as an alien who had entered without inspection (R. 80). The circumstances surrounding the arrest are not substantially disputed, but what Petitioner said or admitted on the day of his arrest and the circumstances surrounding the statements are unclear and contested on the record. It is undisputed that Officer Spence encountered Petitioner in a store parking lot next to Petitioner's car, spoke to Petitioner, and then arrested him (R. 32-33, R. 49). As translated, Petitioner told Officer Spence that he was "from Mexico" (R. 33, 45).[3] Although the

---

[3] At one point of confusing and leading questioning by the Immigration Judge and Trial Attorney, Petitioner appeared to acquiesce in a question that he was "born" in Mexico (R. 38). This inconsistent testimony cannot be accepted at face value, given opposite statements earlier and later, and nuances of translation from Spanish. The Immigration Judge made no finding as to any admission of Mexican birth by Petitioner.

Immigration Judge construed that statement (inaccurately) as meaning that Petitioner conceded Mexican birth or nationality (see R. 33-34, 36), Petitioner's counsel objected to such mischaracterization of testimony (id.) and Petitioner formally denied the charge of Mexican citizenship (R. 31, 80). Officer Spence testified (in English) that Petitioner admitted Mexican citizenship and illegal entry at that initial conversation (R. 49, 82). The record is inconclusive as to precisely what Petitioner may have said to Spence.

The Immigration Judge, in his opinion, found specifically that Petitioner testified he had told Spence that he was "from... Mexico" (2b), but that Spence had testified that Petitioner stated he was "a Mexican citizen" (4b). This Judge's finding of alienage resolved the clear conflict in testimony between Petitioner's testimony and Officer Spence's version of the same events.[4]

---

[4]The Immigration Judge also relied (6b) on a contemporaneously executed form (the I-213 form), which was shown to Petitioner's counsel for the first time at the hearing and was also in English and untranslated (R. 82).

Based on his factual finding, the Judge concluded that Respondent had made a legally sufficient showing of Petitioner's alienage and deportability (5b-6b). The Board of Immigration Appeals affirmed the finding, citing only to the testimony of Officer Spence (9b).

Because Petitioner could not comprehend the language in which Spence testified and interpretation was refused, Petitioner was never informed of the testimony on which the Immigration Judge based his finding of deportability, and on which the Board of Immigration Appeals affirmed. He did not specifically attempt to rebut the critical testimony after Spence testified. The record shows that Petitioner was never informed of the import or exact meaning of Spence's testimony, nor whether he was made aware of the significant difference between his statement that he was "from Mexico" and the Judge's assumption that this meant "born in Mexico" and a "Mexican citizen."

REASONS FOR GRANTING THE WRIT

I. This Petition Presents an Important Unresolved Question Affecting Thousands of Deportation Proceedings.

Each year thousands of persons are brought to deportation hearings in the United States.[5] Many, if not most, are aliens who understand little or no English.[6] Respondent INS has provided for taking of their testimony through translators, and employs a staff of official interpreters for that purpose. 8 C.F.R. § 242.12. As the entire panel of the Court of Appeals recognized, elementary notions of fairness dictate that the privilege of interpretation should extend to testimony against the alien, see 14a-15a. Yet Respondent's Immigration Judge and appellate review Board cavalierly cast aside a request for translation in this case. The Court of Appeals' affirmance on the basis of

---

[5] In 1979, 25,896 aliens were ordered deported from the United States. See, U.S. Department of Justice, Immigration and Naturalization Service, INS 1979 Annual Report, p. 5 (1979).

[6] Over 90% of the aliens expelled in recent years have been Mexican nationals whose native tongue is presumably Spanish. See, INS 1979 Annual Report, supra, n. 5, Table 1.

"harmless error" doctrine is an open invitation to INS to continue to ignore such fundamental procedural rights whenever it suits the whim, haste, or convenience of the presiding hearing officer.[7]

This Court has long recognized the imperative of fundamental fairness in deportation proceedings:

> Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty--at times a most serious one--cannot be doubted. Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness.

Bridges v. Wixon, 326 U.S. 135, 154 (1945). Accord, Shaughnessy v. United States ex rel Mezei, 345 U.S. 206, 212 (1953).

---

[7]The great majority of aliens found deportable take voluntary departure from the United States, see INS 1979 Annual Report, supra, n. 5 (966,137 aliens required to depart without formal deportation order). Once they leave, there can be no effective review of INS procedures in their cases. Those who remain to fight an adverse determination, like Petitioner, can hardly hope to correct the procedural abuse if the courts will so lightly excuse it.

The question whether a deportation proceeding, conducted in a tongue that is foreign to its subject and not interpreted can ever be considered fair, and if so under what circumstances, is basic yet unresolved. This Court has never addressed the question. On this specific question, only the instant case appears in the reports of lower court decisions, and given the holding and history of the case in the Court of Appeals, see pp. 6-7, supra, it hardly provides guidance. This Court should review and resolve the issue.

II. The Decision of the Court of Appeals In Applying the "Harmless Error" Rule Conflicts With Controlling Decisions of This Court and With Principles Adopted In Other Circuits.

A. The Court of Appeals' majority decision fundamentally misapplies the "harmless error" rule and conflicts with the Court's decision in Chapman v. California, 386 U.S. 18 (1967).

Chapman contains the Court's most comprehensive articulation of the "harmless error" rule. While observing that some types of federal constitutional error may be so "unimportant and insignificant" as to be deemed harmless, the Court also recognized that some constitutional rights are "so basic

to a fair trial that their infraction can never be treated as harmless error," 368 U.S. at 22, 23, citing Fahy v. Connecticut, 375 U.S. 85 (1963). Where such a basic right is violated, the inquiry ends: the error cannot be found harmless.[8] However, violations of constitutional rights of lesser stature do not necessarily invalidate the result of the proceedings in which they occur. In such cases, the error must be closely examined to determine whether it caused prejudice. Chapman v. California, supra, 386 U.S. at 23. "The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction," Fahy v. Connecticut, supra, 375 U.S. at 86-87. In the proceeding to determine whether the error was harmful or harmless,

---

[8] See, e.g., Glasser v. United States, 315 U.S. 60, 76 (1942) (denial of right to counsel too fundamental an error to be harmless); Faretta v. California, 422 U.S. 806 (1975), applied in Bittaker v. Enomoto, 587 F.2d 400, 402-03 (9th Cir. 1978), cert. denied 441 U.S. 913 (1979) (denial of right to self-representation a fundamental error which is automatically prejudicial); cf. United States v. Morrison, __U.S.__, 66 L.Ed.2d 564, 567 (1981) (issue of whether deprivation of effective counsel constitutes Sixth Amendment violation not reached; no showing of interference with counsel's effectiveness).

the party responsible for commission of error faces a heavy burden to show that the error was in fact harmless "beyond a reasonable doubt", Chapman v. California, supra, 386 U.S. at 24.

While this Court's discussions of the "harmless error" rule appear in criminal cases, the same principles are applicable in many civil proceedings--especially those which, like deportation hearings, are adversarial or law enforcement proceedings. Both the Ninth Circuit and other circuits have applied the "harmless error" rule or an analysis of prejudice to deportation appeals.[9] The Judicial Code prescribes a somewhat similar harmless error rule in federal appellate

---

[9] See, Nicholas v. Immigration and Naturalization Service, 590 F.2d 802, 809 (9th Cir. 1979) (adequacy of disclosure of documentary evidence); Garcia-Jaramillo v. Immigration and Naturalization Service, 604 F.2d 1236 (9th Cir. 1979) (admission of privileged statement); Castaneda-Delgado v. Immigration and Naturalization Service, 525 F.2d 1295 (7th Cir. 1975) (right to counsel); Ka Fung Chan v. Immigration and Naturalization Service, 634 F.2d 248, 258 (5th Cir. 1981) (denial of continuance and ex parte communications).

review of all judgments, 28 U.S.C. § 2111.[10] The Courts of Appeals have applied this provision to review of administrative proceedings,[11] as well as to appeals in civil actions.

The majority opinion below disregarded the "harmless error" analysis required by Chapman v. California, supra, and merely invoked its two catchwords (15a). It failed to consider whether the right to comprehend adverse testimony is so basic as to exempt it from nice calculations of prejudice. Likewise, the majority's conclusion that the error was harmless here (15a) is unsupported by careful consideration of either the facts

---

[10] 28 U.S.C. § 2111 provides:

"Harmless error.

On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

[11] Kerner v. Celebreeze, 340 F.2d 736, 740 (2nd Cir. 1965), cert. denied 382 U.S. 861 (1965) (review of social security claim proceeding). See also TRW Inc. v. Federal Trade Commission, 647 F.2d 942, 952 (9th Cir. 1981) (review of FTC antitrust order under Clayton Act).

or the applicable legal principles. The majority's observation that Petitioner admitted alienage (15a) is unsupported by the testimony. The panel failed to acknowledge or even consider the burden on INS to prove that the error was harmless beyond a reasonable doubt, and that Petitioner's unclear and equivocal statements do not concede alienage beyond reasonable doubt (27a). These errors squarely conflict with Chapman's directives.

B. Judge Ferguson's dissent is correct on both of its main points: the due process violation was too basic to be made subject to harmless error analysis, and even under such analysis, the error could not be shown harmless.

1. Both the Due Process Clause and the Immigration and Nationality Act assure to an alien "reasonable opportunity to be present" at his deportation hearing, notice of charges against him, and "reasonable opportunity to examine evidence against him...and to cross-examine witnesses presented by the Government," 8 U.S.C. §1252(b), id. §§ (b) (1), (3). INS regulations governing deportation hearings incorporate these requirements, 8 C.F.R. §242.16. The subjection of a physically present but uncomprehending person to a

deportation hearing consisting of indecipherable evidence in an unknown tongue effectively denies him the right to be present, examine evidence, and cross-examine witnesses, as well as minimizing his ability to assist counsel in his defense. Denial of this right is necessarily harmful.

It is "nearly self-evident" that in a criminal proceeding, the refusal to translate testimony against a non-English speaking defendant would be fatal constitutional error, since it would not "permit him to participate effectively in his own defense," United States ex rel Negron v. State of New York, 434 F.2d 386, 389 (2nd Cir. 1970).[12] Fundamental fairness dictates "the notion that no defendant should face the Kafkaesque spectre of an incomprehensible ritual which may terminate in punishment," United States v. Carrion, 488 F.2d 12, 14 (1st Cir. 1973),

---

[12]Presence of English speaking counsel for the non-English speaking subject does not eliminate the deprivation of rights. "The right to defend oneself is personal," Faretta v. California, 422 U.S. 806, 834 (1975), and violation of that right is necessarily prejudicial, Bittaker v. Enomoto, supra, n. 8.

cert. denied 416 U.S. 907 (1974) (dictum). The Court of Appeals for the Seventh Circuit has properly applied this rule to non-criminal deportation proceedings. In Niarchos v. Immigration and Naturalization Service, 393 F.2d 509 (7th Cir. 1968), the Court deplored as contrary to fundamental fairness the "shocking circumstnces" presented by a deportation hearing conducted "without an interpreter, in a language the subject of the inquiry can neither understand nor speak," 393 F.2d at 511 (dictum).[13]

Negron's equation of presence and right to confront the prosecution with ability to comprehend the language of the proceedings, through translation, is valid for deportation hearings. Not only do such proceedings put the subject at risk of loss of liberty and other severe consequences, see p. 13,

---

[13]The Seventh Circuit has also held the harmless error rule inapplicable to a violation of the fundamental right to counsel, in a deportation case where the root problem was the aliens' inability to understand English, and where INS argued that their admission of alienage, made without counsel, was harmless error. Castaneda-Delgado v. Immigration and Naturalization Service, 525 F.2d 1295, 1300-01 (7th Cir. 1975).

supra,[14] but agency regulations underscore the importance of the right to effective participation by aliens, 8 C.F.R. § 242.16(a), and provide for INS interpreters in deportation hearings, 8 C.F.R. § 242.12. These regulations are clearly intended for the benefit of persons charged as deportable, pursuant to statutory mandate, see Bridges v. Wixon, supra, 326 U.S. at 152. An intended beneficiary may insist upon compliance with such regulations, "as safeguards against essentially unfair procedures," id. at 153, citing United States ex rel Bilokumsky v. Tod, 263 U.S. 149, 155 (1923). An agency's violation of its own procedural rules may not be tolerated when the rules are mandated by the Constitution or by statute and when the violation raises constitutional questions. See, United States v. Caceres, 440 U.S. 741, 749, 752 (1979). Both factors are present in Petitioner's case.

It is therefore important this Court review this case to assure that the "harmless

---

[14] In Petitioner's case, deportation would not only remove him from the country, but would separate him from his wife and two U.S. citizen children (7b, 9b).

error" rule does not become a means to erode fundamental due process rights.

2. Respondent fell far short of shouldering its burden to show that the recognized error was unequivocally harmless "beyond a reasonable doubt" in this case. The conclusion of alienage by the Immigration Judge was not based on any admission of alienage by Petitioner, see p. 10, supra, but rather on mere influences drawn by the Judge from Petitioner's testimony, and from testimony by Officer Spence. Petitioner heard neither the Judge's inferential conclusions nor Spence's testimony, which Petitioner's own testimony contradicted. See pp. 9-11, supra. The Immigration Judge's resolution of credibility questions and inferences might be unassailable, if Petitioner had been accorded a reasonable opportunity to persuade the Immigration Judge to adopt Petitioner's position. But denial of translation deprived Petitioner of a timely chance to comprehend and participate effectively in his defense. It cannot be said, "beyond a reasonable doubt," that Petitioner would not have refuted Spence's testimony and the basis for the Judge's inferences if he had understood what was being said, see Fahy v. Connecticut, surpa, Chapman v. California, supra. Petitioner should have been, and now should be, given a fair

opportunity to do so with actual personal knowledge of the testimony and evidence against him as required by fundamental due process principles.

CONCLUSION

The Court should grant its Writ of Certiorari to review the Judgment of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

CHARLES H. BARR
VILMA S. MARTINEZ
JOHN E. HUERTA
MORRIS J. BALLER*

Attorneys for Petitioner

*Attorney of Record

Appendix

APPENDIX A

Opinions and Orders
of
The United States Court
of
Appeals for the Ninth Circuit

Miguel Tejeda-Mata,	)	
	)	
Petitioner,	)	No. 78-3651
	)	
vs.	)	
	)	
Immigration and Naturalization Service,	)	
	)	
Respondent.	)	

OPINION OF THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED AUGUST 29, 1980

Before: CHOY and FERGUSON, Circuit Judges, and BARTELS*, District Judge.

BARTELS, District Judge:

Petitioner Miguel Tejeda-Mata appeals an order of the Board of Immigration Appeals dated November 16, 1978 dismissing his appeal from an Immigration Judge's finding of deportability under section 241(a)(2) of the Immigration and Naturalization Act, 8 U.S.C. § 1251(a)(2), and granting him voluntary departure. 1/ The principal issues presented

---

* The Honorable John R. Bartels, United States District Judge for the Eastern District of New York, sitting by designation.

1/ Section 1251(a)(2) of Title 8 of the United States Code provides:

> (a) Any alien in the United States ... shall, upon the order of the Attorney General, be deported who —
>
> * * *
>
> (2) entered the United States without inspection or at any time or place other than as designated by the Attorney General or is in the United States in violation of this chapter or in violation of any other law of the United States ...
>
> * * *

are whether (1) the Immigration Judge's finding as to the sufficiency of the evidence was supported by reasonable, substantial, and probative evidence, and (2) the administrative authorities denied petitioner due process of law in reaching the ultimate conclusion of deportability. We affirm.

I. Background

Petitioner is a native of Mexico and is charged with having entered the United States near San Ysidro, California without inspection in November 1974. While driving through a store parking lot in Connell, Washington on February 19, 1977, Immigration Officer Jimmy Spence recognized an alien whom he had previously arrested and who had been granted voluntary departure from the United States approximately three weeks earlier. After parking his vehicle so that it blocked the exit of the alien's vehicle, Spence approached and began to open the door on the driver's side of the alien's car. Suddenly, petitioner ran toward the car, asked in Spanish what was happening, and said in English with a heavy Spanish accent, "It's my car." Spence informed him that he was an immigration officer and asked petitioner who he was.

When petitioner appeared not to understand, Spence asked in Spanish where he was from, and petitioner responded that he came from Mexico.

After placing both persons in his vehicle, Officer Spence asked whether either had family or possessions in the United States. Both answered "no," but petitioner changed his mind to the affirmative fifteen minutes en route to the jail in Othello, Washington. When petitioner subsequently refused to sign a request for voluntary departure form, Spence obtained an order to show cause and an arrest warrant and prepared a Record of Deportable Alien, INS Form I-213.

At his deportation hearing held on February 7, 1978, petitioner, through his counsel, denied each of the allegations contained in the order to show cause, and he refused to admit deportability. Through a Spanish language interpreter, petitioner testified regarding the events surrounding his arrest on February 19, 1977, but he refused to answer any questions concerning

---

2/ Information contained on the INS Form I-213 included petitioner's name, local address, permanent address ("Caguallana, Mich., Mexico"), country of citizenship("Mexico"); the names and addresses of his wife, child, and parents; and the circumstances of his arrest and statements made thereafter. The form was signed by INS Officer Spence.

his citizenship or entry into the United States on the ground that the answers might tend to incriminate him. Upon questioning by the INS trial attorney, however, petitioner admitted telling Officer Spence prior to his arrest that he came from Mexico. Petitioner's counsel requested that the testimony of Officer Spence, the only witness offered by the government, be translated for his client into Spanish by the official interpreter. When this request was denied by the Immigration Judge, petitioner's counsel offered to translate the testimony himself so that petitioner would have the benefit of simultaneous translation of the testimony against him. This request was also denied. During the course of Spence's testimony, the INS Form I-213 was admitted into evidence over petitioner's objection.

At the conclusion of the hearing, the Immigration Judge found that (1) petitioner had voluntarily told Officer Spence before arrest that he was from Mexico; (2) because of this admission, petitioner had the burden of proving time, place, and manner of entry into the United States, which burden he failed to carry; and (3) petitioner's deportability had been established by clear, convincing, and unequivocal evidence. He granted petitioner the privilege of

voluntary departure.

The Board of Immigration Appeals dismissed petitioner's appeal in a four-page decision, concluding that the Immigration Judge's admission into evidence of Form I-213 was proper because the document was trustworthy and prepared in the regular course of business; petitioner had failed to meet his burden of proving time, place, and manner of entry into the United States; Officer Spence was authorized to question petitioner without a warrant for his arrest because petitioner failed to produce any evidence that Spence did not have a reasonable suspicion that petitioner was an illegal alien; and since the regulations contained no requirement that the deportation proceedings be recorded in Spanish, petitioner was not denied due process by the Immigration Judge's failure to require such transcription.

This appeal followed.

II. Sufficiency of the Evidence

Petitioner challenges the sufficiency of the evidence on several grounds. First, he asserts that Form I-213 was inadmissible because of its hearsay character and because it was not properly authenticated. Similar contentions were considered and rejected by

this court in Trias-Hernandez v. Immigration and Naturalization Service, 528 F.2d 366, 369 (9th Cir. 1975), where we upheld the admissibility of Form I-213 upon our finding that it was (1) probative on the issue of petitioner's entry into the United States, and (2) fundamentally fair. In this case, the information contained on the form - e.g., name, address, country of citizenship, circumstances of arrest, etc. - was undoubtedly probative, and there is no basis in the record to conclude that the information was obtained from anyone other than petitioner or that it was in any way the product of coercion or duress. Moreover, the authenticity of the document was sufficiently established by the testimony of Officer Spence, who identified it as the I-213 form prepared by him shortly after arriving at the jail in Othello, Washington on February 19, 1977.

Second, petitioner contends that his admission to Officer Spence that he came from Mexico should have been suppressed because it was coerced. On the contrary, at the time petitioner made the statement no arrest had been made, no curtailment of petitioner's liberty had been imposed, and no threat to do so had been made by Officer

Spence. Because petitioner willingly admitted his alienage under such circumstances, he cannot now claim that his statement was the product of an illegal search or seizure. Cuevas-Ortega v. Immigration and Naturalization Service, 554 F.2d 944, 946 (9th Cir. 1977); Illinois Migrant Council v. Pilliod, 540 F.2d 1062, 1071 (7th Cir. 1976), modified in part on rehearing en banc, 548 F.2d 715 (1977). Moreover, section 287(a)(1) of the Immigration and Naturalization Act, 8 U.S.C. § 1357(a)(1), authorizes any INS officer to interrogate without a warrant any person believe to be an alien as to his right to be or remain in the United States. Id. at 1070: Ojeda-Vinales v. Immigration and Naturalization Service, 523 F.2d 286, 287 (2d Cir. 1975); Cheung Tin Wong v. Immigration and Naturalization Service, 468 F.2d 1123, 1128 (D.C.Cir. 1972); Au Yi Lau v. Immigration and Naturalization Service, 445 F. 2d 217, 223 (D.C.Cir), cert. denied, 404 U.S. 864, 92 S.Ct. 64 (1971). In this case, the reasonableness of Officer Spence's belief is supported by a number of circumstances. For example, petitioner was with a known illegal alien, spoke with a distinct Spanish accent, and had trouble understanding English. In addition, he approached and sought to interrupt Spence

as he was trying to open the car door to speak with the known illegal alien, and he appeared shocked when he heard Spence was an INS officer. On the basis of these circumstances, we believe Officer Spence's brief questioning of petitioner concerning his name and country of origin was clearly justified, and we conclude, therefore, that petitioner's statement of alienage was properly admitted by the Immigration Judge. 3/

Finally, petitioner seeks to overturn the finding of deportability on the basis of an allegedly illegal arrest. Section 287(a)(2) of Title 8 U.S.C. authorizes an INS officer to arrest without a warrant "any alien in the United States, if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest..."

3/ Petitioner's contention that Miranda warnings were required at the time of his arrest has previously been rejected by this court in Trias-Hernandez v. Immigration and Naturalization Service, 528 F.2d 366, 368-69 (9th Cir. 1975).

The phrase "has reason to believe" has been equated with the constitutional requirement of probably cause. United States v. Cantu, 519 F.2d 494, 496 (7th Cir.), cert. denied, 423 U.S. 1035, 96 S.Ct. 569 (1975); Au Yi Lau v. Immigration and Naturalization Service, 445 F.2d at 222. In this case, the circumstances listed supra in justification of Spence's interrogation of petitioner, together with his uncoerced admission that he "came from Mexico," constitute a clearly sufficient basis for his warrantless arrest.

Considering the record as a whole, we conclude that the findings of the Immigration Judge were supported by reasonable, substantial, and probative evidence. Woodby v. Immigration and Naturalization Service, 385 U.S. 276, 282, 87 S.Ct. 483, 486 (1966); Garcia-Jaramillo v. Immigration and Naturalization Service, 604 F.2d 1236, 1238 (9th Cir. 1979); Lavoie v. Immigration and Naturalization Service, 418 F.2d 732, 735 (9th Cir. 1969); Cordon de Ruano v. Immigration and Naturalization Service, 544 F.2d 944, 947 (9th Cir. 1977); Trias-Hernandez v. Immigration and Naturalization Service, 528 F.2d at 370; 8 U.S.C. § 1105a (a)(4). Once petitioner's alienage was established - as it was by his admission

to Officer Spence - the burden of proof shifted to him to prove time, place, and manner of entry. Hoonsilapa v. Immigration and Naturalization Service, 575 F.2d 735, 737 (9th Cir.), modified on other grounds, 586 F.2d 755 (1978); Trias-Hernandez v. Immigration and Naturalization Service, 528 F.2d at 370; 8 U.S.C. § 1361. By his refusal to either testify or offer evidence with respect to those questions, petitioner failed to carry his burden, and the Immigration Judge could properly draw adverse inferences from petitioner's silence. Cuevas-Ortega v. Immigration and Naturalization Service, 588 F.2d at 1278; Hoosilapa v. Immigration and Naturalization Service, 575 F.2d at 737; Chavez-Raya v. Immigration and Naturalization Service, 519 F.2d 397, 401 (7th Cir. 1975). Thus, we decline to overturn the findings below with respect to the sufficiency of the evidence.

III. Due Process

Petitioner next asserts that the INS failed to comply with one of its own regulations, 8 C.F.R. § 242.2(e), requiring that the agency inform an alien of his or her right to communicate with consular or diplomatic officials of his or her own

country.[4/] The government apparently concedes its own noncompliance, but argues that petitioner was in no way prejudiced thereby and hence that any error on its part was harmless.

In United States v. Calderon-Medina, 591 F.2d 529, 531 (9th Cir. 1979), this court held that "[v]iolation of a regulation renders a deportation unlawful only if the violation prejudiced the interests of the alien which were protected by the regulation." In considering a violation of precisely the same regulation claimed to have been violated

---

[4/] Section 242.2(e) of Title 8 of the Code of Federal Regulations provides, in pertinent part, as follows:

> (e) Privilege of communication. Every detained alien shall be notified that he may communicate with the consular or diplomatic officers of the country of his nationality in the United States. Existing treaties require immediate communication with appropriate consular or diplomatic officers whenever nationals are detained in exclusion of (sic) explulsion proceedings, whether or not requested by the alien, and, in fact, even if the alien requests that no communication be undertaken in his behalf:***Mexico***.

in this case, we stated as follows:

> The district courts in these cases made no finding of specific harm to these aliens resulting from lack of notice of their right to communicate with the Mexican Consul. Nor did appellees identify evidence of such harm in the record. Therefore, we reverse the orders dismissing the indictments.
>
> On remand the aliens should be allowed the opportunity to demonstrate prejudice resulting from the INS regulation violations. The district courts will determine whether violations of 8 CFR § 242.2(e) harmed the aliens' interests in such a way as to affect potentially the outcome of their deportation proceedings.

Id. at 532.

Although we might be inclined to remand this case for the purpose stated in Calderon-Medina, it is an established principle that this court does not sit as an administrative agency for the purpose of fact-finding in the first instance, and if a petitioner wishes to preserve an issue for appeal, he must first raise it in the proper administrative forum. Der-Rong Chour v. Immigration and Naturalization Service, 578 F.2d 464, 468 (2d Cir. 1978); Cisternas-Estay v. Immigration and Naturalization Service, 531 F.2d 155, 160 (3d Cir. 1976); Leung v. Immigration and Naturalization Service, 531 F.2d 166, 168 (3d Cir. 1976); Chi Sheng Liu v. Holton,

297 F.2d 740, 744 (9th Cir. 1961); Chung Young Chew v. Boyd, 309 F.2d 857, 861 (9th Cir. 1962). There is nothing in the record of this case suggesting that petitioner, who has at all times been represented by counsel, raised the question of noncompliance by the INS with its consular communication regulation before either the Immigration Judge or the Board of Immigration Appeals. Petitioner's failure to raise this issue below is significant because the factual record necessary to proper review by this court can only be made by the Immigration Judge. Therefore, in the absence of any reason justifying petitioner's decision to raise for the first time in this court the issue of the alleged failure of INS to comply with 8 C.F.R. § 242.2(e), we conclude that his failure to exhaust administrative remedies on this issue precludes our consideration of it at this stage of the proceedings.

Petitioner contends finally that he was denied due process by the failure of the Immigration Judge to require a Spanish language transcription of the record and to permit simultaneous translation of the testimony offered against him. Although we do not believe that dual language trans-

cription of the record was required, the inexplicable refusal of the Immigration Judge to permit simultaneous translation of the testimony against petitioner by either the official interpreter or petitioner's counsel seems unquestionably to be an abuse of his discretion. It is true, as the government points out, that deportation proceedings have been deemed civil in nature, rather than criminal, and hence that all the due process protections accorded to a defendent in a criminal proceeding do not apply in this context. Abel v. United States, 362 U.S. 217, 237, 80 S. Ct. 683, 696 (1960); Whetstone v. Immigration and Naturalization Service, 561 F.2d 1303, 1306 (9th Cir. 1977). It is equally well established, however, that when an alien is charged with having entered the United States illegally, he or she is entitled to a full and fair hearing prior to deportation, Wong Yang Sung v. McGrath, 339 U.S. 33, 49-51, 70 S.Ct. 445, 454 (1950); Garcia-Jaramillo v. Immigration and Naturalization Service, 604 F.2d at 1239, and this court and others have repeatedly recognized the importance of an interpreter to the fundamental fairness of such a hearing if the alien cannot speak English fluently. See Niarchos v. Immigration and Naturalization Service, 393 F.2d

509, 511 (7th Cir. 1968); Ramirez v. Immigration and Naturalization Service, 550 F.2d 560, 565 n.5 (9th Cir.1977); Orozco-Rangel v. Immigration and Naturalization Service, 528 F.2d 224 (9th Cir. 1976); Leung v. Immigration and Naturalization Service, 531 F.2d at 168; Haidar v. Coomey, 401 F.Supp. 717, 720 (D.Mass. 1974). Where, as here, the official interpreter was present at the hearing in order to translate petitioner's own testimoney and petitioner's counsel offered to assist if necessary, the Immigration Judge's denial of the request for simultaneous translation of Officer Spence's testimony was plainly improper.

Faced with such an abuse of discretion, this court would, as a general rule, feel compelled to reverse and remand this case for a new hearing. Limited to the specific circumstances of this case, however, including, in particular, the fact that the untranslated testimony only confirmed petitioner's own admission of alienage, we conclude, albeit reluctantly, that the Immigration Judge's error was harmless and that a new hearing would be no more than a futile gesture.

Accordingly, for the reasons set forth above, the decision of the Board of Immigration Appeals is affirmed.

FERGUSON, Circuit Judge, dissenting:

I must dissent.

It is well established that the due process clause of the fifth amendment applies in deportation proceedings and requires that an alien be granted a full and fair hearing. Ramirez v. I&NS, 550 F.2d 560, 563 (9th Cir. 1977). Unless the statutory requisites [1/] for such hearings

---

1/ See 8 U.S.C. § which provides in pertinent part:

> Determination of deportability in any case shall be made only upon a record made in a proceeding before a special inquiry officer, at which the alien shall have reasonable opportunity to be present, unless by reason of the alien's mental incompetency it is impracticable for him to be present.... Proceedings before a special inquiry officer acting under the provisions of this section shall be in accordance with such regulations, not inconsistent with this chapter, as the Attorney General shall prescribe. Such regulations shall include requirements that --
>
> (1) the alien shall be given notice, reasonable under all the circumstances, of the nature of the charges against him and of the time and place at which the proceedings will be held;
>
> * * *
>
> (3) the alien shall have a reasonable opportunity to examine the evidence against him to present evidence in his own behalf, and to cross-examine witnesses presented by the Government; ....

have been satisfied, an alien has not received the due process protection to which he is entitled. Bridges v. Wixon, 326 F.S. 135, 154 (1945); Hirsch v. I&NS, 308 F.2d 562, 566-67 (9th Cir. 1962). The majority notes the due process requirement, and points out that "this court and others have repeatedly recognized the importance of an interpreter to the fundamental fairness of such a hearing if the alien cannot speak English fluently." The majority implicitly acknowledges [2/] that

---

[2/] The majority correctly notes that an alien is "entitled to a full and fair hearing prior to deportation," but fails to point out that this right is derived from the due process clause. See, e.g., Ramirez v. I&NS, supra, 550 F.2d at 563: "Constitutional due process requirements under the Fifth Amendment are satisfied by a full and fair hearing." When the majority points out this court's recognition of the "importance of an interpreter to the fundamental fairness" of deportation hearings involving non-English speaking aliens, it thus acknowledges that a hearing cannot comport with due process absent simultaneous translation. The majority's conclusion that the immigration judge's refusal to allow translation was "plainly improper" merely represents its implicit application of this due process requirement to the facts of this particular case.

the denial of Tejeda-Mata's request for an interpreter constituted a denial of due process, but it holds that the denial was harmless. I submit that a denial of due process which is as fundamental as the denial here is not subject to review for harmful error. Furthermore, even if the harmless error standard were appropriate here, the error at issue was undoubtedly harmful.

I.

The majority cites no authority to support its application of the harmless error standard here. That omission is not wholly surprising, because the denial of an interpreter [3/] should fall within

---

[3/] In holding that due process required simultaneous translation in this case, this court would not have to decide whether the government must provide an interpreter at its own expense. An official interpreter was already present in the courtroom to translate Tejeda-Mata's testimony for the court. In addition, Tejeda-Mata's counsel offered to translate for his client but was denied permission. No further expenditure would have accrued had the judge allowed Tejeda-Mata the same right he enjoyed himself--the right to fully understand and participate in the proceeding.

that category of violations which are exempted from the application of the harmless error rule by the Supreme Court's holding in Chapman v. California, 386 U.S. 18 (1967). In Chapman, The Court recognized that "there are some constitutional rights so basic that their infraction can never be treated as harmless error." Id. at 23. An alien's right to understand the proceedings against him must fall within this category, for without this understanding, the rights to be present, to examine evidence, and to cross-examine--all of which are guaranteed to an alien by statute--are rendered meaningless. See 8 U.S.C. § 1252(b); Hirsch v. I&NS, supra, 308 F.2d at 566-67. I am certain that the majority would never have allowed the immigration judge's decision to stand had Tejeda-Mata not been allowed to be present at the deportation hearing. Yet, refusal to allow simultaneous translation effectively denied Tejeda-Mata that very right. Presence can have no meaning absent comprehension. The right to understand must, then, fall into that category of rights so fundamental that their denial cannot be characterized as harmless. See Chapman v. California, supra, 380 U.S. at 23.

Furthermore, this court has previously indicated its concern over the absence of adequate translation at deportation hearings. In Chung Young Chew v. Boyd, 309 F.2d 857 (9th Cir. 1962), we held that reopened hearings could not provide a basis for a deportation order because the petitioner's due process rights had been violated at the initial (1954) hearing. The record of that first hearing revealed that the petitioner had not been advised of his right to counsel and was not provided with the services of an interpreter. On review, the Board of Immigration Appeals held that the evidence adduced at the 1954 hearing had been improperly considered at subsequent proceedings. That evidence was not probative, it held, since that hearing failed to comply with the provisions of 8 U.S.C. § 1252(b), which requires, in part, that the alien have a reasonable opportunity to be present, that he be given notice of the charges against him, that he have the privilege of being represented by counsel, that he have a reasonable opportunity to examine the evidence against him and to cross-examine witnesses.[4/]

[4/] See footnote 1, supra.

Id. at 862. On subsequent review by this court, we explained that the Board's finding of lack of compliance with § 1252(b) referred "to the failure to inform petitioner at the 1954 hearing that he was entitled to counsel and to the failure to ascertain his ability to understand English, no interpreter being present." Id. at 862 n.12. The failure to reintroduce crucial evidence "at a hearing in which petitioner had been accorded due process," id. at 863, we held, required that the deportation order be set aside.

In Orozco-Rangel v. I&NS, 528 F.2d 224 (9th Cir. 1976), we noted the presence of an interpreter at a deportation hearing in holding that the petitioners were accorded due process. In so holding, we relied on the presence of an official interpreter whose services were provided to the aliens, and on counsel's fluency in Spanish and his assistance in translation. Id. Significantly, we found it necessary to point out these factors despite our conclusion that petitioners "admitted the essential charges upon which the [deportation] orders were based." Id.

Other circuit courts have also stressed the importance of simultaneous translation in ruling on cases similar to the case below. Niarchos v. I&NS, 393 F.2d 509 (7th Cir. 1968), is illustrative of these courts' reactions to the absence of interpreters at deportation proceedings involving non-English speaking individuals. The Niarchos petitioner asked the court to reverse an earlier deportation order because he did not have the services of of qualified interpreter.[5/] The court noted that the petitioner was precluded from challenging the validity of the order because he departed the United States after its issuance,[6/] but it addressed the interpreter issue in dictum in which it recognized the per se harm resulting from a failure to provide translation:

> We think that the absence of an interpreter at the 1962 hearing is contrary to the aim of our law to

---

5/ The existence of the earlier departation order was significant because it precluded an application for re-entry without the Attorney General's permission. See 8 U.S.C. § 1182(a)(16).

6/ See 8 U.S.C. § 1105a(c).

> provide fundamental fairness in administrative proceedings. Despite the essential discretionary power of the Immigration officials in dealing with violations of the of the crewman provision....it would seem clearly not within the Service's discretion to conduct an official inquiry, without an interpreter, in a language the subject of the inquiry can neither understand nor speak. We therefore in this dictum express the hope that should petitioner seek permission to re-enter....the Attorney General will consider the petition in the light of the shocking circumstances of the 1962 deportation hearing."

Id. at 511. The circumstances surrounding the instant case are equally shocking.

The Seventh Circuit also has recognized that the right to counsel in deportation proceedings is "too important and fundamental a right to be circumscribed by a harmless error rule." Castaneda-Delgado v. I&NS, 525 F.2d 1295, 1300 (7th Cir. 1975). Castaneda involved the denial of the right to counsel as granted by § 1252(b). The court noted that the provisions granted aliens the right to counsel "are an integral part of the procedural due process to which the alien is entitled." Id. at 1302. Similarly, the right to be present is an integral part of the due process rights granted aliens by that same statute.

The Castaneda court was unwilling to eviscerate these provisions by applying the harmless error standard. We would do well to follow their example.

The Second Circuit, like the Seventh Circuit, has held that it would not tolerate the denial of an interpreter to a non-English speaking defendant. In U.S. ex rel. Negron v. State of New York, 434 F.2d 386 (2d Cir. 1970), the court affirmed the grant of a petition for habeas corpus by a defendant convicted of murder. At trial, the defendant's testimony was translated into English, but the witnesses' testimony was not translated into Spanish. [7] The court held that the trial lacked the basic and fundamental fairness required by the due process clause. In reaching that conclusion, the court determined that Negron not only was deprived of his right to be confronted by adverse witnesses, but was also effectively deprived of the even more fundamental right to be present.

---

[7] Negron did receive summaries of witnesses' testimony. The court recognized, however, that these summaries could not effectively replace simultaneous translation. Id. at 389-90.

The court explained that if the right to be present is to have any meaning, it must encompass the ability to consult with one's lawyer regarding adverse testimony. Id. at 389. In the court's view, these denials were intolerable:

> Negron's incapacity to respond to specific testimony would inevitably hamper the capacity of his counsel to conduct effective cross-examination. Not only for the sake of effective cross-examination, however, but as a matter of simple humaneness, Negron deserved more than to sit in total incomprehension as the trial proceeded.

Id. at 390. Tejeda-Mata, like Negron, deserved more.

I am, of course, fully aware of the civil nature of deporation proceedings. It is undeniable, however, that deportation hearings are "fraught with serious consequences to the alien." Castaneda-Delgado v. I&NS, supra, 525 F.2d at 1301. The Supreme Court has noted that

> [t]hough deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty--at times a most serious one--cannot be doubted. Meticulous care must be exercised lest

> the procedure by which he is deprived of that liberty not meet the essential standards of fairness.

Bridges v. Wixon, supra, 326 U.S. at 154.[8]

There can be no question but that the immigration judge failed to exercise "meticulous care" here. His unwillingness to allow translation deprived Tejeda-Mata of his right to understand and participate in his deportation hearing. As demonstrated above, this court and other courts have stressed the fundamental importance of these rights. Their denial can be nothing other than per se harmful.

II.

Even if the harmless error standard were applicable here, the refusal to allow simultaneous translation into Spanish was not harmless error. As enunciated by the Supreme Court, that standard demands that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." Chapman v. California, supra, 386 U.S. at 24.

---

[8] See also Delgadillo v. Carmichael, 332 U.S. 388, 391 (1947): "[D]eportation can be the equivalent of banishment or exile."

A close reading of the record convinces me that the error here was undoubtedly harmful.

Contrary to the majority's assertions, it is not clear that petitioner admitted alienage. He did admit telling Officer Spence that he was "from Mexico." (R. 33). The immigration judge later characterized this testimony as follows: "He [Tejeda-Mata] testified that he [Officer Spence] asked him where he was born and he said he was born in Mexico." (R. 34). Officer Spence testified that Tejeda-Mata stated before arrest that "he was a Mexican citizen." (R. 49). Neither the judge's characterization nor Spence's testimony was translated into Spanish. In addition, the I-213 form, completed in English by Officer Spence after Tejeda-Mata's arrest and admitted into evidence at the deportation hearing, contains statements which similarly enlarge upon those statements admitted to by petitioner. [9] Tejeda-Mata

---

[9] Those comments include an assertion that the petitioner admitted to an illegal presence in the United States. In addition, Mexico is given as the petitioner's country of birth, and a Mexican city is listed as petitioner's permanent residence.

might have been able to point out these conflicting descriptions of his admission to counsel had he been aware of them, and we cannot properly penalize him for his counsel's failure to observe these conflicting reports. As the Negron court emphasized, the inability to respond to testimony inevitably hampers counsel's ability to conduct an effective cross-examination. U.S. ex rel. Negron v. State of New York, supra, 434 F.2d at 390.

In his oral decision, the immigration judge concluded that both the petitioner's birth in a foreign country and his Mexican citizenship had been established by his own admission. In reaching these conclusions, the judge clearly relied on Officer Spence's testimony. As a result, the failure to allow Officer Spence's testimony to be translated can hardly be characterized as harmless beyond a reasonable doubt. The majority errs in stating that reversal and remand for a new hearing would amount to no more than a futile gesture; a new hearing is, in fact, an absolute necessity.

I therefore dissent.

ORDER ENTERED FEBRUARY 18, 1981

Before: BROWNING, Chief Judge, WRIGHT CHOY, GOODWIN, WALLACE, SNEED, KENNEDY, ANDERSON, HUG, TANG, SKOPIL, SCHROEDER, FLETCHER, FARRIS, PREGERSON, ALARCON, POOLE, FERGUSON, NELSON, CANBY, BOOCHEVER, NORRIS, and REINHARDT, Circuit Judges.

Upon the vote of the majority of the regular service judges of this court, it is ordered that this case shall be re-heard by an en banc panel of the court pursuant to Rule 25 of the Rules of the U.S. Court of Appeals for the Ninth Circuit. The previous three-judge panel assignment is hereby withdrawn.

Signed
James R. Browning
Chief Judge

ORDER ENTERED MARCH 18, 1981

Before: BROWNING, Chief Judge, CHOY, WALLACE, TANG, SKOPIL, ALARCON, POOLE, FERGUSON, NELSON, NORRIS and REINHARDT, Circuit Judges.

This case shall be submitted to the limited en banc panel, without oral argument, on April 17, 1981.

ORDER ENTERED APRIL 20, 1981

Before: BROWNING, Chief Judge, CHOY, WALLACE, ANDERSON, TANG, SKOPIL, ALARCON, POOLE, FERGUSON, NELSON and REINHARDT, Circuit Judges.

The order of March 18, 1981 is vacated.

The parties are requested to file supplemental briefs simultaneously on or before May 18, 1981, on the following issues:

1. Was it error, constitutional or otherwise, for the Immigration Judge to deny Tejeda-Mata's request for interpretation?

2. If it was error, should the judgment be reversed?

No extension of time will be granted.

Oral argument will be heard at the United States Court of Appeals and Post Office Building, San Francisco, California, on June 12, 1981 at 10:00 a.m.

ORDER ENTERED SEPTEMBER 22, 1981

Before: BROWNING, Chief Judge, CHOY, WALLACE, ANDERSON, TANG, SKOPIL, POOLE, FERGUSON, NELSON, ALARCON, and REINHARDT, Circuit Judges.

By Order filed February 18, 1981, a majority of the full court ordered this case reheard en banc pursuant to this Court's Rule 25. The previous three-judge panel assignment was withdrawn.

Following argument and submission to the en banc court on June 12, 1981, a majority of the en banc court determined that the Order taking the case en banc had been improvidently entered. The en banc court was undecided as to whether it possessed the power to vacate the order taking the case en banc, or whether that power rested exclusively with the full court. Without resolving this issue, the full court has authorized the en banc court to take such action in this case as it deems appropriate. Accordingly, the en banc court orders this case returned to the three-judge panel to which it was originally assigned on the ground that the Order that this case should be reheard en banc was improvidently entered.

Signed
James R. Browning
Chief Judge

RE: Tejeda-Mata v. INS - No. 78-3651

WALLACE, J., dissenting:

I respectfully dissent from the Order returning this case to the three-judge panel.

Initially, the majority of our active judges voted to vacate the opinion of the panel, and hear the case en banc pursuant to our limited en banc procedure. I did not join that majority. As I understand it, no intra-circuit conflict was claimed but the case was taken en banc to determine the proper standard of review of the error that occurred at the immigration hearing. The three-judge panel majority held that the immigration judge's error was an abuse of discretion, but affirmed the decision of the Board of Immigration Appeals because the judge's error was harmless. Judge Ferguson, in dissent, argued that such a fundamental denial of due process is not subject to review for harmless error. Thus, the question of the proper standard of review for procedural errors implicating fundamental aspects of due process in a deportation hearing was clearly delineated, and a majority of the full court thought it important enought to consider en banc.

The limited en banc court was selected and, subsequent to the filing of supplemental briefs, the limited en banc court conferred and voted. A judge was assigned to write a majority opinion. It was only after this vote and assignment of the disposition that the possibility of vacating our Order to hear the case en banc as improvidently granted was raised.

To my knowledge, nothing has occurred in the last several months to alter the importance of the issue that was to be determined by the en banc court. I assume that the judges of the whole court who voted to hear the case en banc have not suddenly been persuaded that the panel majority was correct, or that the issue is no longer of sufficient importance. I assume further that the reason that the issue may now have become "unimportant" is due to the vote of the en banc court.

In my view, the en banc procedure is designed to give full consideration to issues of importance and set the law of the circuit once and for all. This is equally important whether the panel chooses to take a view different from that of the three-judge panel or give the position taken its imprimatur.

If we have truly take a case en banc improvidently because the issue is not one of sufficient importance to justify using the tremendous amount of judicial resources that en banc consideration requires, it would seem to me that this could have been determined by an initial reading of the briefs and preliminary discussions. I would have registered no objection if a member of the majority of the court that originally voted to take the case en banc changed his or her mind and sought to vacate the en banc consideration at a relatively early stage. Cf. Ferguson v. Moore-McCormack Lines, 352 U.S. 521, 559-62 (1957) (Harlan, J., dissenting) (addressing Supreme Court's rule of dismissing certiorari as improvidently granted).

I acknowledge that the decision by the full court to allow the en banc court to dispose of this case as it now does was not intended to establish a rule as to how similar cases will be disposed of in the future. If such were the case, I fear that we would have created a device by which giving en banc imprimatur to a panel decision could be avoided. Generally speaking, when there is no intra-circuit conflict, those who vote to take

a case en banc do so because they disagree with, or at least are not convinced by, the three-judge panel opinion. When a majority of the en banc court agrees to sustain the position of the three-judge panel opinion, those who wanted to take the case en banc may feel frustrated. The members of the en banc court minority might be able to convince enough members of the en banc court majority to vacate the order to hear the case en banc as improvidently granted. Subsequently, the en banc court minority could hope to take the issue en banc again in a future case and hope for a more favorable make-up of the en banc court. I do not suggest that this happened here or that anyone on our court would do so. I only point out that we should be wary of rules that present such an easy opportunity for mischief. Thus, I hope this ad hoc determination will not inadvertently become precedent.

But I oppose even this ad hoc disposition. The majority of our court considered the specific question so important that it deserved en banc consideration. As there is no reason for us to conclude that the question still does not maintain that same degree of importance to the full court,

en banc consideration cannot be said to have been improvidently granted. The only change has been the vote of the en banc court. This to me has nothing to do with whether en banc consideration was improvidently granted. Therefore, I would have the en banc court decide the case.

Judge Choy joins in this dissent.

ORDER ENTERED DECEMBER 11, 1981

Before: CHOY and FERGUSON, Circuit Judges and BARTELS,* District Judge.

Appellant petitioned for a rehearing of this case and suggested that it be reheard en banc. By order filed on February 18, 1981, a majority of the full court ordered a rehearing en banc pursuant to this court's Rule 25, withdrawing the original three-judge panel assignment of this case.

By order filed on September 22, 1981, the en banc court returned this case to the original three-judge panel on the ground that the order of February 18, 1981 had been improvidently entered.

The three-judge panel now denies appellant's petition for rehearing and reinstates its majority opinion and dissenting opinion filed herein on August 29, 1980 and reported in 626 F.2d 721.

The mandate shall issue forthwith.

---

*The Honorable John R. Bartels, United States District Judge for the Eastern District of New York, sitting by designation.

ORDER ENTERED JANUARY 4, 1982

Before: CHOY and FERGUSON, Circuit Judges, and BARTELS,* District Judge

The emergency motion of the petitioner, Miguel Tejeda-Mata, for recall and stay of mandate is Granted. The Clerk will recall the mandate and not reissue it pending action by the Supreme Court on appellant's petition for writ of certiorari provided that the petition for writ of certiorari be filed within thirty days.

Signed
Warren J. Ferguson

---

* The Honorable John R. Bartels, United States District Judge for the Eastern District of New York, sitting by designation.

ORDER ENTERED JANUARY 11, 1982

Before: CHOY and FERGUSON, Circuit Judges, and BARTELS,* District Judge.

The one-judge order filed herein on January 4, 1982, is withdrawn.

Petitioner's emergency motion for recall and stay of mandate is Denied.

---

* The Honorable John R. Bartels, United States District Judge for the Eastern District of New York, sitting by designation.

APPENDIX

Decisions and Orders
of
The United States Immigration
and
Naturalization Service

File: A21 604 306 - Seattle

In re: Miguel Tejeda-Mata, Respondent

In deportation proceedings

ORAL DECISION OF THE U.S. IMMIGRATION JUDGE

(February 7, 1978)

The respondent is a 20-year old married male. During the course of the hearing he denied the four allegations contained in the Order to Show Cause. They assert that he is not a citizen or national of the United States but is a native and citizen of Mexico, who entered the United States near San Ysidro, California, in November, 1974, not then being inspected by a United States Immigration Officer. Deportability is denied. Mexico is selected as country of deportation and the respondent has applied for voluntary departure in lieu thereof.

In connection with denial of deportability, it is respondent's contention that the evidence supporting the charge was obtained illegally as a result of an illegal arrest and was the "the fruit of the poisoned tree" because he was not, when certain information was obtained from him, advised as to his Miranda rights. There was a motion made to terminate the proceedings, which motion was denied.

As to the question of the illegality of the arrest and not being advised of

his Miranda rights, respondent testified that on February 19, 1977, when first interviewed by an Immigration Officer, he was in the vicinity of a store with some friends. He had given the keys to his car to a male friend and he observed that someone was trying to open the door of the automobile. He approached this individual, who happened to be an immigration officer in civilian clothes. He was asked by this officer where he was from and he said, "Mexico." It is his testimony that the officer then showed his identification concerning his being an immigration officer. He said he was not asked any further questions at this time. According to his testimony, he heard this person, who later identified himself as an immigration officer, speak to his friend who was in the car and say something like "Back here again?" He said that, when he first spoke to the immigration officer, he did it in connection with the officer trying to open the door to the automobile as he was trying to find out what was happening. He was then taken to a local jail and asked more questions but advised the immigration officer that he wished to talk to

his attorney and he refused to answer questions, but apparently he did answer some. He claims that, when in the local jail, he was not told of his right to an attorney. He was questioned as to whether or not he wished voluntary departure without a hearing and he declined the offer. The others who were with him at the time accepted the voluntary departure.

The immigration officer is Border Patrol Agent Spence. He identified the respondent by name and testified he first encountered him on February 19, 1977. He happened to be driving through a store parking lot and, while doing so, recognized the person in the respondent's automobile as being one who had been granted voluntary departure and who apparently departed some three weeks previously and returned. He was in the process, he said, of apprehending or getting the respondent's friend out of respondent's car when the respondent came running up to him and asked him, "What's happening?" The officer said that he said in English to the respondent, "I am an Immigration Officer," and the respondent apparently did not understand so he asked in Spanish where the respondent was from. Respondent answered that he is a

Mexican citizen. He then put both respondent's friend in his automobile and inquired of them as to whether or not they had any personal belongings that they wished to obtian and whether or not they had relatives in the United States. Both indicated at that time that they did not. On the drive to the jail some minutes later, the respondent advised the officer that he had a wife and baby in the United States. The officer testified that Exhibit 2, the I-213, Record of Deportable Alien, was made on the same day that he encountered the respondent and was made in the regular course of business. It was filled out by him after all the aliens who were there at that time were offered voluntary departure and after respondent was advised of his rights.

Here we have a situation where the immigration officer who arrested the respondent knew that the individual, who happened to be in the respondent's car, was an alien illegally in the United States as he remembered that he had been granted voluntary departure some three weeks previously. The respondent approached this officer and, after being asked a question in English and not understanding, was asked

another question as to where he was from and he voluntarily answered he was a Mexican citizen. Under these circumstances, I find that the officer had every right to suspect that the respondent might be an alien illegally in the United States as he was interfering or questioning the officer's activities in arresting respondent's friend prior to questioning. This was in the interrogatory stage and he had not at this time been arrested. In the interrogatory stage a person suspected of being an alien illegally in the United States has no right to the Miranda warnings. Birth in a foreign country was established at this stage. The burden is now on the respondent to establish that he is a citizen of the United States. The respondent does not make this claim.

Therefore, he has not met his burden and I find that alienage is established. Pursuant to Section 291 of the Immigration and Nationality Act, when alienage is established, the burden is on the respondent to prove time, manner, and place of entry. The respondent has failed to do this. Therefore, he is presumed to be an alien who is illegally here. Other than this, Exhibit 2 reflects that the

respondent is a Mexican citizen, who entered the United States without inspection at San Ysidro, in 1974. Concerning his rights to the Miranda warnings, when this information was apparently obtained from him, suffice to say that this is a civil proceeding and not criminal, and Miranda warnings do not come into play. There is no indication in the record that any information was obtained from respondent through coercion or duress. Based on this record, I find it has been established by evidence which is clear, unequivocal and convincing, that the respondent is deportable as charged.

Voluntary departure has been applied for in the alternative. In this connection respondent testified that he has no criminal record. He said that he can depart at his own expense and will depart within the time authorized. I, therefore, find he is statutorily eligible for the relief requested.

Voluntary departure is an application, which is discretionary with the Immigration Judge. In order to determine whether or not the application should be acted on favorably, we have to consider the facts

surrounding his case. Respondent testified he has in the United States his wife and child. His child was born here. His wife is at this time pregnant and birth is expected within a few days. According to what he said, he has no immigration record. The record does reflect that he was offered voluntary departure on one previous occasion and he refused it, but this was under safeguards. He indicated that he would be able to depart sometime within the vicinity of six weeks after the birth of the child, which as mentioned above, is expected in a few days. He said that he has never been on welfare and he would remain out of the United States, if granted voluntary departure, until he could come back in a legal manner. Because the respondent has no previous immigration record and because his wife is expecting a baby in a few days, I will grant his application for voluntary departure. I would like to state at this juncture the record reflects that the respondent's wife is in the United States illegally at this time as she has or did apply for a priority date but one was not issued to her.

ORDER: It is ordered that, in lieu of an order deportation, respondent be granted voluntary departure without expense to the Government on or before March 31, 1978, or any extension beyond such date as may be granted by the District Director, and under such conditions as the District Director shall direct.

IT IS FURTHER ORDERED that, if respondent fails to depart when and as required, the privilege of voluntary departure shall be withdrawn without further notice or proceedings and the following order shall thereupon become immediately effective: Respondent shall be deported from the United States to Mexico on the charge contained in the Order to Show Cause.

Signed
Newton T. Jones
U.S. Immigration Judge

(Appeal reserved.)

OPINION OF BOARD OF IMMIGRATION APPEALS

(November 16, 1978)

This case presents an appeal from a decision of the immigration judge on February 7, 1978, finding the respondent deportable and granting him the privilege of voluntary departure, with an alternate order of deportation to Mexico. The appeal will be dismissed.

The respondent, age 21, is a native and citizen of Mexico who entered the United States without inspection in November 1974. He married a Mexican citizen, also apparently in this country illegally (Tr. p. 47), in the State of Washington in January 1976. They are the parents of at least one United States citizen child, and the birth of a second was imminent at the time of the hearing in this matter (Tr. p. 41). At the time of his arrest by the Service in February 1977, it appears that the respondent voluntarily answered that he is a Mexican citizen (Tr. pp. 4, 20). The facts concerning the nature of the respondent's arrest, as well as those describing the events immediately following his arrest, were fully set forth and considered by the immigration judge in his well-written decision.

It further appears that no information was obtained from the respondent by coercion or duress at the time of his hearing and that alienage was properly established by the introduction into evidence of Form I-213 or Record of Deportable Alien (Ex. 2). [1] Contrary to counsel's objection thereto (Tr. p. 30), we are satisfied that the immigration judge's acceptance of the Form I-213 as having been obtained "in the regular course of business" (Tr. p. 31) was proper in the circumstances of this case. [2]

---

[1] This exhibit was erroneously marked Ex.1.

---

[2] As pointed out in the Service brief, counsel represented aliens in cases more than one year ago, long before the hearing in this case, in which the Board stated as follows:

> We point out that, in the absence of any proof that the Form I-213 contains information which is incorrect or which was obtained by coercion or force, this form is inherently trustworthy and would be admissible even in court as an exception to the hearsay rule as a public record and report. Fed. Rules of Evid., Rule 803(8). See Trias-Hernandez v. INS, 528 F.2d 366 (9 Cir. 1975); Matter of Mejia, Interim Decision 2527 (BIA 1976); Matter of Davila, Interim Decision 2521 (BIA 1976); Matter of Swissair, "Flight SR 168", Interim Decision 2403 (BIA 1975).
>
> See Matter of Avalos and Ramos, A19 281 296, A20 959 040, A20 959 041 (BIA September 29, 1977).

The authenticity of the Form I-213 has been established by the officer who prepared the form and testified concerning it commencing at Tr. p. 21. The form has the same name and the same A number as are on the Order to Show Cause. There is no requirement that Miranda warnings be given. See Trias-Hernandez v. INS, 528 F.2d 366, 369 (9 Cir. 1975). Under section 291 of the Immigration and Nationality Act, as amended, the respondent bears the burden of proving the time, place and manner of his entry into the United States. See Matter of Ortega-Mojaro, 13 I&N Dec. 838 (BIA 1970). Since by his silence at the hearing the respondent has failed to sustain his burden, he is presumed to be in the United States in violation of Law. We therefore find that deportability has been established by evidence which is clear, convincing and unequivocal.

Section 287(a)(1) of the Act gives authority to officers of the Service to interrogate, without a warrant, any person believed to be an alien as to his right to be or remain in the United States. This statutory authority has been repeatedly upheld by the courts, Cheung Tin Wong v. INS, 468 F.2d 1123 (D.C. Cir. 1972);

Au Yi Lau v. INS, 445 F.2d 217 (D.C. Cir. 1971), cert. denied 404 U.S. 864 (1971); Yam Sang Kwai v. INS, 411 F.2d 683 (D.C. Cir. 1969), cert. denied 396 U.S. 877 (1969). A suspicion can be a reasonable one if no more appears than that the person approached is in an area in which illegal aliens are found. See Matter of Au, Yim and Lam, 13 I&N Dec. 294 (BIA 1969), aff's 445 F.2d 217 (D.C. Cir. 1971); Matter of Methure, 13 I&N Dec. 522 (BIA 1970).

Since the respondent raised the claim that the immigration officer had no reasonable suspicion that he was an alien, the burden of establishing this claim rested upon him. No evidence has been submitted by the respondent which would tend to show that the immigration officer lacked a reasonable suspicion that he was an alien. The respondent has failed to meet his burden. Interrogation has been characterized neither as illegal nor as an arrest. Matter of Scavo, 14 I&N Dec. 326 (BIA 1973). In the absence of evidence indicating that the Service lacked a reasonable suspicion that the respondent was an alien, the investigator had the authority to question the respondent without a

warrant to determine whether the respondent was an alien and, if so, whether he had a right to be or to remain in the United States.

Under section 264(e) of the Act, essentially a noncriminal and regulatory statute. "Every alien, eighteen years of age and over, shall at all times carry with him and have in his personal possession any certificate of alien registration or alien registration receipt card issued to him pursuant to subsection (d). "Thus it follows that a request by an officer of the Service for such identification, from one believed to be an alien, is a legitimate request for identification. See Matter of Yau, 14 I&N Dec. 630 (BIA 1974); United States v. Sacco, 428 F. 2d 264 (9 Cir. 1970), cert. denied 400 U.S. 903 (1970).

On appeal, counsel alleged that the respondent was denied due process by the immigration judge's failure to provide a verbatim transcript of the record in the Spanish language. The immigration judge clearly stated at the commencement of the hearing that it was being conducted through the services of an "official Spanish interpreter for the Immigration

and Naturalization Service" (Tr. p. 1). This statement obviously was intended to convey to both respondent and counsel the impression that the interpretation would be translated into the English language. This was done. In any event, as also pointed out in the Service brief, there is no specific requirement in the Code of Federal Regulations that the foreign language be recorded along with the English.

Upon review of the record, we are satisfied that the decision of the immigration judge was correct. We find that the respondent's alienage and deportability have both been clearly established. We further find that this appeal has been both frivolous and dilatory. See Matter of Cheung, Interim Decision 2592 (BIA 1977). Accordingly, the appeal will be dismissed.

The immigration judge granted the respondent a period of 52 days for voluntary departure. We have held that in those cases in which a period exceeding 30 days has been granted, the respondent will be given 30 days from the date of our decision in which to depart voluntarily. See Matter of Chouliaris, Interim Decision 2572

(BIA 1977). The District Director, however, is authorized to extend that period in his discretion. See 8 C.F.R. 244.2.

ORDER: The appeal is dismissed.

FURTHER ORDER: Pursuant to the immigration judge's order, the respondent is permitted to depart from the United States voluntarily within 30 days from the date of this order or any extension beyond that time as may be granted by the District Director; and in the event of failure so to depart, the respondent shall be deported as provided in the immigration judge's order.

Signed
Mary P. Maguire
Acting Chairman

Opposition

Supreme Court, U.S.
FILED
APR 2 1982
L. STEVAS
CLERK

No. 81-1460

In the Supreme Court of the United States

OCTOBER TERM, 1981

MIGUEL TEJEDA-MATA, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

MARGARET J. PERRY
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether, in the circumstances of this case, the denial of petitioner's request for simultaneous translation of the testimony of an adverse witness at his deportation hearing was harmless error.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	9

TABLE OF AUTHORITIES

Cases

Bowe v. *INS*, 597 F.2d 1158	6
Castaneda-Delgado v. *INS*, 525 F.2d 1295	9
Chapman v. *California*, 386 U.S. 18	7, 8
Chavez-Raya v. *INS*, 519 F.2d 397	8
Chung Young Chew v. *Boyd*, 309 F.2d 857	6
Garcia-Jaramillo v. *INS*, 604 F.2d 1236	6
Harisiades v. *Shaughnessy*, 342 U.S. 580	8
Ka Fung Chan v. *INS*, 634 F.2d 248	6
Martin-Mendoza v. *INS*, 499 F.2d 918	8-9
Moore v. *Illinois*, 434 U.S. 220	8, 9
Murgia-Melendrez v. *INS*, 407 F.2d 207	9
Nicholas v. *INS*, 590 F.2d 802	6
Orozco-Rangel v. *INS*, 528 F.2d 224	6
United States v. *Barraza-Leon*, 575 F.2d 218	6
United States v. *Calles-Pineda*, 627 F.2d 976	6
United States v. *Morrison*, 449 U.S. 361	8, 9
United States v. *Vega-Mejia*, 611 F.2d 751	6
United States ex rel. Bilokumsky v. *Tod*, 263 U.S. 149	8
Woodby v. *INS*, 385 U.S. 276	8

Constitution and statute:

United States Constitution:	
Fifth Amendment (Due Process Clause)	8
Sixth Amendment	8
8 U.S.C. 1362	9

In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1460

MIGUEL TEJEDA-MATA, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-28a) is reported at 626 F.2d 721. The opinion of the Board of Immigration Appeals (Pet. App. 9b-15b) and the decision of the immigration judge (Pet. App. 1b-8b) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 29, 1980. A petition for rehearing was denied on December 11, 1981 (Pet. App. 38a). The petition for a writ of certiorari was filed on February 3, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In November 1974, petitioner, a native and citizen of Mexico, entered the United States illegally near San Ysidro, California. More than two years later, on February 19, 1977, petitioner was arrested by an officer of the Immigration and Naturalization Service in Connell, Washington. After a deportation hearing, petitioner was found deportable and was granted the privilege of voluntary departure (Pet. App. 1b-8b). The Board of Immigration Appeals dismissed petitioner's administrative appeal (Pet. App. 9b-15b), and the court of appeals affirmed (Pet. App. 1a-28a).

1. The evidence showed that on February 19, 1977, in Connell, Washington, Immigration Officer Jimmy Spence was driving through a parking lot when he recognized an alien whom he had previously arrested and who had been granted voluntary departure from the United States about three weeks earlier. As Officer Spence began to open the door of the alien's vehicle, petitioner ran over, asked in Spanish what was happening, and said in English with a heavy Spanish accent, "It's my car" (Pet. App. 2a). The officer identified himself and asked petitioner in Spanish where he was from. Petitioner responded that he came from Mexico (*id.* at 2a-3a, 3b).

After placing both persons in his car, Officer Spence asked whether either of them had family or possessions in the United States. Both men responded in the negative, but petitioner changed his response 15 minutes later. When petitioner refused to sign a form requesting voluntary departure, Officer Spence placed petitioner under arrest and prepared an INS Form I-213, "Record of Deportable Alien" (Pet. App. 3a, 4b). The information recorded on the INS Form I-213 included petitioner's name, local address, permanent

address ("Caguallana, Mich., Mexico"), country of citizenship ("Mexico"), the names and addresses of his immediate family members and the circumstances of his arrest (*id.* at 3a n.2).

2. At his deportation hearing petitioner was represented by an attorney who spoke Spanish and communicated with petitioner throughout the proceedings in that language (R. 35, 37, 50, 75). Through a Spanish language interpreter, petitioner testified about the events surrounding his arrest, but he refused to answer any questions about his citizenship or entry into the United States on the ground that the answers might tend to incriminate him (Pet. App. 3a-4a). Petitioner did admit telling the arresting officer that he came from Mexico (*id.* at 4a).[1]

Officer Spence was the only witness called by the INS. Petitioner's attorney requested that Officer Spence's testimony be translated simultaneously into Spanish for petitioner's benefit but the immigration judge denied this request (Pet. App. 4a). The officer testified that prior to his arrest petitioner had admitted that he was from Mexico. The officer also testified concerning his preparation of the INS Form I-213, and that document was admitted into evidence (*ibid.*).

3. The immigration judge concluded that petitioner was deportable as charged (Pet. App. 1b-8b). He

---

[1] During questioning of petitioner by the attorney for the INS, the immigration judge several times had to caution petitioner's attorney about conversing with petitioner in Spanish while the interpreter was simultaneously translating petitioner's testimony into English for the record. However, the immigration judge told the attorney he could request a recess whenever he wished to converse with petitioner (R. 35-36; "R." refers to the administrative record).

rested his conclusion on petitioner's admission of Mexican citizenship shown in the INS Form I-213 and on petitioner's testimony that he voluntarily told Officer Spence prior to the arrest that he was from Mexico (*id.* at 3b-5b). Based on these admissions of alienage, the immigration judge ruled that petitioner had the burden of proving the legality of the time, place and manner of his entry into the United States (*id.* at 5b). Because petitioner chose to remain silent on these issues, the immigration judge concluded that petitioner had failed to sustain his burden of proof. The Board of Immigration Appeals upheld the findings of the immigration judge and dismissed petitioner's appeal, rejecting petitioner's claim that he was denied due process by the denial of his request for translation of Officer Spence's testimony into Spanish (*id.* at 9b-15b).

The court of appeals affirmed (Pet. App. 1a-28a). Addressing petitioner's due process claim, the court observed that "the inexplicable refusal of the Immigration Judge to permit simultaneous translation of the testimony against petitioner * * * seems unquestionably to be an abuse of his discretion" (*id.* at 14a). As a general rule, the court said, it would reverse and remand for a new hearing in such a situation (*id.* at 15a). However, in the particular circumstances of this case, including petitioner's own admission of alienage, the court concluded that the "error was harmless and * * * a new hearing would be no more than a futile gesture" (*ibid.*).[2]

---

[2] Judge Ferguson dissented (Pet. App. 16a-28a). He concluded that the deprivation of the right to simultaneous translation is not subject to review for harmless error, and that, even if the harmless error rule were applicable, the error here was not harmless.

ARGUMENT

The decision of the court of appeals in this case is quite limited. The court merely held that, in the particular circumstances presented here, the immigration judge's refusal to permit simultaneous translation of the arresting officer's testimony at petitioner's deportation hearing was harmless error. This fact-bound ruling does not warrant review.

Petitioner concedes (Pet. 14) that the question whether the harmless error rule applies to the denial of a request for translation by a non-English speaking alien in a deportation hearing has never previously been decided by the lower courts. Nevertheless, petitioner argues (Pet. 12-13) that this Court should grant review of this novel issue because the court of appeals' decision assertedly will affect the rights of thousands of aliens to simultaneous translation at their deportation hearings. We disagree.

While it may be true that simultaneous translation is appropriate in many of the deportation hearings conducted by the INS in a given year, petitioner does not suggest that the denial of translation in this case reflects a general INS policy of denying such services in appropriate cases. Moreover, there is nothing in the court of appeals' decision that suggests that that court approves, or will approve in the future, an unreasonable denial of simultaneous translation to those aliens who request it. Indeed, the court below specifically concluded that the immigration judge's conduct in this case was an abuse of discretion (Pet. App. 14a) and warned the INS that, as a general rule, it will reverse and remand for new hearings if such abuses occur (*id.* at 15a). The court did not remand for a new hearing in this case only because it "reluctantly" concluded that the "error was harmless" and

"a new hearing would be no more than a futile gesture" (*ibid.*).

This decision is consistent with the decisions of the other courts of appeals that have held that an alien asserting a denial of due process based on a procedural defect in his deportation proceeding is not entitled to a new hearing unless he can demonstrate that he was prejudiced by the error. See, *e.g.*, *Ka Fung Chan* v. *INS*, 634 F.2d 248, 258 (5th Cir. 1981); *United States* v. *Calles-Pineda*, 627 F.2d 976, 977-978 (9th Cir. 1980); *United States* v. *Vega-Mejia*, 611 F.2d 751, 752 (9th Cir. 1979); *Garcia-Jaramillo* v. *INS*, 604 F.2d 1236, 1238-1239 (9th Cir. 1979); *Nicholas* v. *INS*, 590 F.2d 802, 808-810 (9th Cir. 1979); *Bowe* v. *INS*, 597 F.2d 1158 (9th Cir. 1979); *United States* v. *Barraza-Leon*, 575 F.2d 218, 221-222 (9th Cir. 1978); *Orozco-Rangel* v. *INS*, 528 F.2d 224 (9th Cir. 1976); *Chung Young Chew* v. *Boyd*, 309 F.2d 857, 864-865 (9th Cir. 1962).

As the court below concluded (Pet. App. 15a), petitioner did not suffer any demonstrable prejudice as a result of the immigration judge's refusal to order simultaneous translation of Officer Spence's testimony, either through the official interpreter or through petitioner's counsel. Petitioner was not deprived of an opportunity to understand the substance of Officer Spence's testimony because petitioner's counsel spoke fluent Spanish and was given an opportunity by the immigration judge to recess the proceedings at any time to consult with petitioner or translate the substance of the testimony. See note 1, *supra*. Petitioner was not precluded from cross-examining Officer Spence because petitioner's attorney, who best understood the legal implications of the officer's testimony, subjected Officer Spence to extensive cross-examination.

Furthermore, although petitioner attempted to avoid deportation by refusing to admit that he was a citizen of Mexico, petitioner's alienage was clearly established by the evidence. Petitioner himself admitted during his testimony at the deportation hearing that on the day of his arrest he told Officer Spence that he was from Mexico. Officer Spence's testimony merely corroborated this admission. Moreover, the INS Form I-213, which was properly admitted into evidence, contained petitioner's admissions that he was born in Mexico, that he permanently resided in that country, and that he had been in the United States illegally for more than one year. Petitioner's testimony and the admissions contained in the INS Form I-213 provide a sufficient basis for the deportation order, without even considering Officer Spence's testimony. Indeed, throughout this litigation, petitioner has never contested the accuracy of the immigration judge's factual determination that petitioner is an alien who entered this country illegally without inspection. Thus, the fact that petitioner was not allowed a simultaneous translation of Officer Spence's testimony does not detract from the validity of the deportation order. Because petitioner was not prejudiced by the immigration judge's refusal to allow simultaneous translation of Officer Spence's testimony, he is not entitled to another deportation hearing.

Relying on language in *Chapman* v. *California*, 386 U.S. 18, 23 (1967), petitioner argues (Pet. 14-15, 17, 18-22), however, that the right to simultaneous translation in a deportation proceeding is a right so fundamental that its denial can never be considered harmless. In *Chapman*, the Court specifically declined to hold that constitutional errors should always require reversal of a criminal conviction without regard to prejudice. 386 U.S. at 22. While the Court in *Chap-*

man acknowledged that some kinds of constitutional errors, including the right to counsel in a criminal case, might not be subject to a harmless error analysis (*id.* at 23 & n.8), the Court's subsequent decisions have indicated that even "violations of the right to counsel may be disregarded as harmless error" in an appropriate case. *United States* v. *Morrison*, 449 U.S. 361, 365 (1981). See *Moore* v. *Illinois*, 434 U.S. 220, 232 (1977).

Moreover, petitioner's reliance on *Chapman* and on decisions of other courts in criminal cases (Pet. 15 & n.8, 19-20 & n.12) disregards the distinction between criminal proceedings and deportation proceedings. A deportation proceeding is not a criminal prosecution. See *Woodby* v. *INS*, 385 U.S. 276, 285 (1966); *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 594 (1952); *United States ex rel. Bilokumsky* v. *Tod*, 263 U.S. 149, 154-155 (1923). Many of the procedural rights that must be provided to criminal defendants are grounded in the specific guarantees of the Bill of Rights, whereas the procedural rights of aliens in deportation proceedings are more limited because they are based on general notions of fairness embodied in the Due Process Clause of the Fifth Amendment.[3] Fairness is a flexible concept, which necessarily includes consideration of the harm or prejudice resulting from the chal-

---

[3] Unlike a criminal defendant, an alien in a deportation proceeding may be compelled to give nonincriminating responses to questions about his alien status, and his silence may be used as a basis for drawing adverse inferences. See *United States ex rel. Bilokumsky* v. *Tod*, *supra*, 263 U.S. at 153-155. Similarly, an alien's prehearing statement to immigration authorities is admissible in a deportation proceeding despite the failure to give the alien *Miranda* warnings. See *Chavez-Raya* v. *INS*, 519 F.2d 397 (7th Cir. 1975). The Sixth Amendment right to confrontation does not bar the admission of hearsay evidence at deportation proceedings. See *Martin-*

lenged conduct. It follows, therefore, that petitioner cannot rely on decisions in criminal cases to establish that the harmless error rule has no application in this case.[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

MARGARET J. PERRY
Attorney

APRIL 1982

Mendoza v. *INS*, 499 F.2d 918, 921 (9th Cir. 1974). Furthermore, although an alien is statutorily entitled to be represented by counsel at a deportation hearing (8 U.S.C. 1362), unlike an indigent criminal defendant an indigent alien has no right to counsel at government expense. See *Martin-Mendoza* v. *INS*, *supra*, 499 F.2d at 922; *Murgia-Melendrez* v. *INS*, 407 F.2d 207, 208-209 (9th Cir. 1969).

[4] Petitioner's citation (Pet. 20 n.13) of *Castaneda-Delgado* v. *INS*, 525 F.2d 1295, 1300-1301 (7th Cir. 1975), is also unavailing. In that case, the court held that the right to counsel at a deportation hearing is not subject to a harmless error analysis. But the decision in *Castaneda-Delgado* ignores the distinction between deportation proceedings and criminal trials and it is based on the erroneous premise, rejected in *United States* v. *Morrison*, *supra*, and *Moore* v. *Illinois*, *supra*, that violations of the right to counsel may never be considered harmless even where no prejudice ensues. The decision in *Castaneda-Delgado* could lead to absurd results. Under that decision, an alien would be entitled to reversal of his deportation order and a new hearing if he requests and is denied counsel at his initial deportation hearing and then admits his deportability and concedes that the denial of counsel did not have any significant effect on the outcome of the hearing.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1982 370590 054